IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

SECOND APPEAL NO. 762 OF 2004.

Office notes, office memoranda of Coram, appearances, Court's orders or directions and Registrar's orders.

Court's or Judge's orders.

Shri A.M.Kulkarni for the Appellant.

Shri G.S.Godbole for the Respondents.

CORAM : ABHAY S.OKA, J.

DATED : 3rd Sept., 2004.

P.C.:

1. This Appeal was admitted on 23rd August 2004 after hearing both the parties. Shri Godbole the learned Counsel appearing for Respondents states that considering the substantial questions of law framed by this Court while admitting the Appeal, the Respondents have no objection if the impugned Judgment and Decree passed by the Appellate Court is quashed and set aside and the Appeal is remanded to the District Court. He states that the Respondents have given written instructions to him to that effect. He, therefore, submitted that the order of remand may be passed. I have also heard Shri Kulkarni for the Appellant.

2. Paragraph 22 of the Judgment of the Appellate Court reads thus:

"22. The present plaintiffs have produced Will, it is registered Will. It is some evidence to show that the original plaintiff bequeath suit property to the present plaintiff though it is not a proof it can be relied. Under sec.71 of the Indian Evidence Act and burden is upon the defendant is disprove the fact or show that there are suspicious circumstance. In fact, there are no any suspicious circumstance on record. However, the defendant have failed to adduced any sort of evidence to disprove the will and in absence of such evidence it can be said the present plaintiffs have proved that original plaintiff bequeath suit property to them and they got all rights and liability in respect of suit property. Hence, I reply this point in the affirmative."

In the said paragraph the Appellate Court seems to have taken a view that when some evidence was led by the original Plaintiff to show existence of the Will set up by him, it is for the Defendants to adduce evidence to disprove the Will and in the absence of such evidence it will have to be held that the Plaintiff has proved the original Will.

3. The approach of the Appellate Court seems to be erroneous. If a Will is relied upon by a party to the suit and if execution of the said Will is disputed, it is for the party relying upon the Will to prove the Will in accordance with the provisions of the Indian Evidence Act 1872.

4. There are other issues which are canvased before the Appellate Court regarding the weightage to be given to the evidence of the witnesses who were treated as hostile. There is also an issue as to whether the Will could have been relied upon in the absence of any pleadings. Considering the approach of the Appellate Court as reflected from the paragraph 22 of the Judgment, the suggestion made by the learned Counsel for the Respondents will have to be accepted.

5. Hence the following order:

(i) The Second Appeal is partly allowed. The impugned Judgment and Decree dated 16th April 2004 is quashed and set aside.

(ii) Civil Appeal No.808 of 2003 is remanded to the District Court, Pune, for hearing the same afresh.

(iii) The Appellate Court will decide the Appeal

afresh as expeditiously as possible and in any event on or before 30th June 2005.

(iv) All questions onmerits are kept open.

(v) Certified copy expedited.

Judge.